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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 812

WILLIAM HOWARD (PAT) O'BRYAN,
Appellant,

VERSUS

STATE OF OKLAHOMA, EX REL. OKLAHOMA BAR ASSOCIATION,
Appellee.

On Appeal From the Supreme Court of the State of Oklahoma

MOTION TO DISMISS

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February, 1964.

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Appellee, State of Oklahoma, *ex rel.* Oklahoma Bar Association, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss on the grounds (a) that the appeal does not present a substantial federal question and (b) that the judgment appealed from rests on an adequate non-federal basis.

STATEMENT

This is an appeal from a judgment and order of disbarment entered by the Supreme Court of Oklahoma on

June 18, 1963, in *State* v. *O'Bryan*, 385 P.2d 876 (Appendix A to Jurisdictional Statement). Petition for rehearing was denied on September 10, 1963.

Appellant was disbarred as a result of his unprofessional conduct in certain bankruptcy proceedings in the United States District Court for the Western District of Oklahoma involving a business trust known as Selected Investments. On March 24, 1958, Appellant filed a "proof of debt" in the bankruptcy claiming substantial fees for legal services rendered the bankrupt. On May 21, 1958, Appellant filed an amended proof of debt to which he attached a purported letter employment contract between himself and the bankrupt, bearing date of October 29, 1954. The trustee in bankruptcy objected to the allowance of Appellant's claim. Upon the hearing of the trustee's objections, at which Appellant appeared and testified concerning his claim, the Judge of the Federal Court, Honorable Stephen S. Chandler, found that the letter employment contract of October 29, 1954, was fraudulent, denied Appellant's claim and disbarred Appellant from practice in the Federal Court (Appendix to Jurisdictional Statement, pp. iii, v-viii).

Subsequently, Judge Chandler brought Appellant's conduct in his Court to the attention of the Executive Council of the Oklahoma Bar Association. The Executive Council, in accordance with authority vested in it by the rules of the Supreme Court of Oklahoma, assumed original jurisdiction of the matter, authorized the filing of a formal complaint against Appellant, and designated one of its members as Trial Examiner. The complaint against Appellant, signed by the then President of the Oklahoma Bar Associa-

tion, charged Appellant with filing false and fraudulent instruments in support of his proof of debt in the bankruptcy proceedings for the purpose of misleading the Court; and that such acts constituted professional misconduct in violation of Canons 22 and 29 of the Canons of Professional Ethics of the American Bar Association as adopted by the Supreme Court of Oklahoma (Appendix to Jurisdictional Statement, p. viii).

Appellant denied the charges of the complaint and requested a public hearing—which request was granted. Appellant was present in person and by his counsel at the hearing. The Trial Examiner found the Appellant guilty of the charges and recommended disbarment. The findings and recommendations of the Trial Examiner were reviewed and approved the Central Committee and Executive Council of the Oklahoma Bar Association and were then submitted to the Supreme Court of Oklahoma (Appendix to Jurisdictional Statement, p. ix).

The Supreme Court of Oklahoma found that the letterhead of the purported October 29, 1954, employment contract "was not in existence at least until 1955, probably in September" (Appendix to Jurisdictional Statement, p. xxvii), and concluded that the evidence established "to a reasonable certainty that the charge against him (Appellant) is true" (Appendix to Jurisdictional Statement, p. xxix). The recommendation of disbarment was approved.

THE FEDERAL QUESTIONS PRESENTED BY APPELLANT ARE NOT SUBSTANTIAL.

Appellant's contentions, briefly stated, are that:

1. The disciplinary procedure established under the Revised Rules of the Supreme Court of Oklahoma Creating, Controlling and Regulating the Oklahoma Bar Association (Appendix to Jurisdictional Statement, pp. liii, *et seq.*) is lacking in due process of law.

2. The manner and conduct of the disciplinary proceedings in this case as to Appellant denied him due process of law.

The Bar of Oklahoma is an integrated bar. *In re Integration of the State Bar of Oklahoma*, 185 Okla. 505, 95 P.2d 113. The Oklahoma Supreme Court has exclusive power to prescribe rules for the conduct of attorneys, their discipline, and to revoke permits to practice law. 5 Okla. Stat. 1961, Sec. 13; *State ex rel.* v. *Ferguson*, 356 P.2d 734 (Okla. 1960). The Oklahoma Supreme Court by rule has adopted the Canons of Ethics of the American Bar Association as the standard of professional conduct for members of its Bar, Article 10 of The Revised Rules Creating, Controlling and Regulating the Oklahoma Bar Association, 60 Okla. Stat. 1961, Chap. 1, App. 1. The authority of the Supreme Court of a State to integrate its Bar was affirmed by this Court in *Lathrop* v. *Donahue*, 367 U.S. 820, 81 S. Ct. 1826, 6 L.Ed.2d 1191 (1961).

Due process in disciplinary proceedings requires that an attorney be given notice of the proceedings, an opportunity to defend at the hearing, and that the proceedings

be essentially fair. *Bradley* v. *Fisher*, 80 U.S. 335, 13 Wall. 335, 20 L.Ed. 646 (1872); and see, cases cited in the annotation at 98 L.Ed. 856. Under the rules governing procedure in disciplinary matters of the Oklahoma Supreme Court, a copy of a complaint is served upon the attorney involved (Appendix to Jurisdictional Statement, p. ix), a trial is conducted, which may be public if the attorney requests (Appendix to Jurisdictional Statement, p. ix), and the findings of the Trial Examiner are reported to the Executive Council of the Bar.

The Executive Council may adopt, modify or set aside the findings of the Trial Examiner. In the event the Executive Council recommends disciplinary action, its report is filed with the Supreme Court and the respondent receives a copy. The recommendation of the Executive Council is reviewed by the Supreme Court in an adversary proceeding which affords the respondent ample opportunity to be heard (Appendix to Jurisdictional Statement, p. lxv).

Obviously, the rules of the Supreme Court provide for notice, a hearing, and the right to be represented by counsel. The right of fair trial is protected by the review of the recommendations of the Executive Council in the Supreme Court: as the Oklahoma Supreme Court stated in the decision which Appellant seeks to have reviewed, "The ultimate responsibility rests with the Court * * * This Court itself has the final say in matters of the present sort."

It is not the function of this Court to enact procedural rules for the discipline of members of State Bar Associations. In states having integrated bars, the State Supreme Courts may adopt the procedure deemed best suited for the local bar organization. Whatever the mechanics of the pro-

cedure, there is no matter for federal concern as long as minimal standards of due process are satisfied. Appellant fails to demonstrate in what particular the disciplinary procedure in his State is lacking in due process when measured against the applicable standard in such cases.

Appellant argues that the disciplinary procedure, *as applied in his case*, violated the required due process of law. He contends that alternative methods of procedure are available under the Rules, and that the Bar Association selected the procedure which was least advantageous and most unfavorable to him. Specifically, Appellant complains that the Executive Council conducted no preliminary investigation; that he was not given a copy of the report of the Trial Examiner before the review of this report by the Executive Council and Central Committee; and that he was denied oral argument before the Executive Council. These matters do not condemn the proceedings in Appellant's case: due process of law was satisfied by the hearing before the Trial Examiner and the complete review in the Oklahoma Supreme Court.

Appellant contends that the proceedings in his case are repugnant to the due process clause because the Trial Examiner was a member of the Executive Council. It is not unique in disciplinary proceedings for the roles of complainant and judge to be combined. This does not result in a denial of due process. *Brinkley* v. *Hassig*, 83 F.2d 351 (10th Cir. 1936); *McVicar* v. *State Board of Law Examiners*, 6 F.2d 33 (D.C.W.D. Wash. 1925).

Appellant characterizes as "hearsay" the admission in evidence of the transcript of the hearing in connection with his claim in bankruptcy, and particularly charges that the

Trial Examiner was unduly influenced by the order of disbarment entered by Judge Chandler. Where an attorney is accused of professional misconduct and violation of his solemn oath by committing a fraud upon a court, the admission of evidence of the alleged fraud cannot be a denial of due process. Appellant ignores the fact that the order of disbarment did not stand alone—ample evidence was introduced to demonstrate that the purported letter employment contract of October 29, 1954, was a forgery and a fraud upon the court.

In Section 4 of his Jurisdictional Statement, Appellant claims due process is violated in his case because the record is "warped." He bases this statement on the refusal of the Supreme Court of Oklahoma to issue a Writ of Mandamus to compel the Bar Association to make the minutes of the Executive Council in connection with his disciplinary action available to the Clerk of the Supreme Court of Oklahoma for inclusion in the record to be certified to this Court. Appellant had designated these minutes in his Notice of Appeal. However, these minutes had not been introduced in evidence in the hearing before the Trial Examiner and they were not in the record presented to the Supreme Court of Oklahoma; consequently, they were never a part of the record. Had Appellant made a timely request for these minutes, they would have been furnished him—the Rules so require—and Appellant could have made them a part of the record. Appellant cannot now complain that his own failure in this respect amounts to a denial of due process.

Appellant contends that his disbarment violates due process because the charge upon which he was disbarred—

filing a false and fraudulent claim—was "abandoned." This simply is not so. Appellee never at any time dismissed the charge of misconduct in filing a false instrument to support Appellant's bankruptcy claim. This strange argument is apparently based on the undisputed fact that Appellant rendered valuable professional services to the bankrupt; Appellant's conclusion being that his claim was therefore valid. Appellant's misconduct did not consist of filing a claim for services which were not rendered. The misconduct of which Appellant was charged lay in committing a fraud on the Court by attempting to bolster his claim with a false employment contract.

THE JUDGMENT APPEALED FROM RESTS ON AN ADEQUATE NON-FEDERAL BASIS

Appellant attempts, under the guise of due process arguments, to secure a review by this Court of propositions which were considered and determined by the Supreme Court of Oklahoma, as though this Court were authorized to review generally the correctness of the judgment of the Supreme Court of Oklahoma. This position on the part of Appellant is clearly disclosed by his discussion of the Pennsylvania case of *In re Schlesinger's Appeal* (p. 25, Jurisdictional Statement). Appellant there says "the Pennsylvania Supreme Court in that case was reviewing the action of a Common Pleas Court which was the court of first instance just as this Court sits now in review of the action of the Oklahoma Supreme Court which was the court of first instance in the case at bar." Such is not the function of this Court. As was stated in *Re Anastaplo*, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135 (1961):

> "We conclude with observing that our function here is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were another state court of review, still less to express any view upon the wisdom of the state's action."

In the absence of a showing of arbitrary or discriminatory action in the State Court proceedings resulting in disbarment, there is no matter of federal concern. *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the appeal should be dismissed.

Respectfully submitted,

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February, 1964.